DEPARTMENT OF STATE REVENUE

Revenue Ruling #2018-03ST
October 29, 2018

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ISSUES

Sales and Use Tax - Online Database

Authority: IC 6-2.5-1-1; IC 6-2.5-1-24; IC 6-2.5-1-26.5; IC 6-2.5-1-27; IC 6-2.5-1-27.5; IC 6-2.5-1-28.5; IC 6-2.5-2-1; IC 6-2.5-2-2; IC 6-2.5-4-1; IC 6-2.5-4-6; IC 6-2.5-4-16.4; 45 IAC 2.2-1-1; 45 IAC 2.2-4-2; *Grand Victoria Casino & Resort, LP v. Indiana Dep't of State Revenue*, 789 N.E.2d 1041 (Ind. T.C. 2003); Sales Tax Information Bulletin #8 (June 2018); Revenue Ruling 2011-05ST, (December 9, 2011) 20111130 Ind. Reg. 045110713NRA; *Streamlined Sales and Use Tax Agreement* (May 10, 2018).

A taxpayer ("Company") is seeking an opinion as to whether Company should collect sales tax for online subscription fees charged for access to an online information database.

STATEMENT OF FACTS

Company is an out-of-state corporation that operates a chain of retail locations. Company also maintains an online database that can be accessed by payment of a subscription fee. The subscription fee can be a monthly, quarterly or a yearly charge.

The subscription provides the customer (usually a student) with study guides, as well as tools and suggestions on how to improve their writing. The website also contains copies of textbooks and assists users in answering questions from these textbooks. The access allows students to read essays and papers written by previous students to help them get started on writing their own paper. Nothing can be downloaded.

DISCUSSION

Based on the foregoing facts, Company requests a ruling as to whether it should assess sales tax on the subscription fee to access the database described above. Pursuant to IC 6-2.5-2-1(a) and IC 6-2.5-2-2(a), sales tax is imposed on retail transactions made in Indiana. A retail transaction is defined in IC 6-2.5-4-1(b) as the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1(c) goes on to provide in pertinent part:

> For purposes of determining what constitutes selling at retail, it does not matter whether:
> . . .
> (2) the property is transferred alone or in conjunction with other property or services . . .

"Tangible personal property" is defined in IC 6-2.5-1-27 as:

> . . . personal property that:
> (1) can be seen, weighed, measured, felt, or touched; or
> (2) is in any other manner perceptible to the senses.
> The term includes electricity, water, gas, steam, and prewritten computer software.

Except for certain enumerated services, sales of services generally are not retail transactions and are not subject to sales or use tax. 45 IAC 2.2-4-2 clarifies the taxability of services as follows:

> (a) Professional services, personal services, and services in respect to property not owned by the person rendering such services are not "transactions of a retail merchant constituting selling at retail", and are not subject to gross retail tax. Where, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail unless:

(1) The serviceman is in an occupation which primarily furnishes and sells services, as distinguished from tangible personal property;
(2) The tangible personal property purchased is used or consumed as a necessary incident to the service;
(3) The price charged for tangible personal property is inconsequential (not to exceed 10%) compared with the service charge; and
(4) The serviceman pays gross retail tax or use tax upon the tangible personal property at the time of acquisition.

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.
(c) Persons engaging in repair services are servicemen with respect to the services which they render and retail merchants at retail with respect to repair or replacement parts sold.
(d) A serviceman occupationally engaged in rendering professional, personal or other services will be presumed to be a retail merchant selling at retail with respect to any tangible personal property sold by him, whether or not the tangible personal property is sold in the course of rendering such services. If, however, the transaction satisfies the four (4) requirements set forth in [subsection (a)], the gross retail tax shall not apply to such transaction.

IC 6-2.5-1-1 states that a "'unitary transaction' includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated." A unitary transaction is clarified in 45 IAC 2.2-1-1(a) as follows:

> Unitary Transaction. For purposes of the state gross retail tax and use tax, such taxes shall apply and be computed in respect to each retail unitary transaction. A unitary transaction shall include all items of property and/or services for which a total combined charge or selling price is computed for payment irrespective of the fact that services which would not otherwise be taxable are included in the charge or selling price.

Regarding the sales of items transferred electronically, IC 6-2.5-4-16.4(b) provides that a person engages in making a retail transaction when the person (1) electronically transfers specified digital products to an end user; and (2) grants to the end user the right of permanent use of the specified digital products that is not conditioned upon continued payment by the purchaser. "Specified digital products," as currently defined by IC 6-2.5-1-26.5, include only digital audio works (e.g., songs, spoken word recordings, ringtones), digital audiovisual works (e.g., movies), and digital books. Products "transferred electronically" are defined at IC 6-2.5-1-28.5 to mean products that are "obtained by a purchaser by means other than tangible storage media."

Pursuant to Section 333 ("Use of Specified Digital Products," effective Jan. 1, 2010) of the *Streamlined Sales and Use Tax Agreement* ("SSUTA;" May 10, 2018), of which Indiana is a signatory, "[a] member state shall not include any product transferred electronically in its definition of 'tangible personal property.'" Section 332 of the SSUTA provides that "[a] member state shall not include 'specified digital products', 'digital audio-visual works', 'digital audio works' or 'digital books' within its definition of 'ancillary services', 'computer software', 'telecommunication services' or 'tangible personal property.'" This means prewritten computer software transferred electronically is still taxable. Section 332 also provides that a state is not prohibited from imposing a sales or use tax on specified digital products.

Additionally, IC 6-2.5-1-27.5(c)(8) explicitly excludes ancillary services from the definition of telecommunication services, which are taxable under IC 6-2.5-4-6 when they are intrastate, meaning "that the transmission must originate and terminate within Indiana." *Grand Victoria Casino & Resort, LP v. Indiana Dep't of State Revenue*, 789 N.E.2d 1041, 1045 (Ind. T.C. 2003). Accordingly, ancillary services are not subject to sales tax in Indiana.

Based on the foregoing, Indiana may impose sales tax on products transferred electronically only if the products meet the definition of specified digital products, pre-written computer software, or telecommunication services.

Use of the online database necessarily involves the use of prewritten computer software. "Prewritten computer software" is defined in IC 6-2.5-1-24 as follows:

> Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:
> (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the programs does not cause the combination to be other than prewritten computer software.
> (2) Prewritten computer software includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser.

> (3) If a person modifies or enhances computer software of which the person is not the author or creator, the person is considered to be the author or creator only of the person's modifications or enhancements.
> (4) Prewritten computer software or a prewritten part of the software that is modified or enhanced to any degree, where the modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software. However, where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for such a modification or enhancement, the modification or enhancement is not prewritten computer software.

Because the software component of Company's service offering is remotely accessed, a fee for Company's website services would not be subject to Indiana sales or use taxes pursuant to IC 6-2.5-4-16.7, which is effective July 1, 2018. IC 6-2.5-4-16.7 provides that prewritten computer software sold, rented, leased, or licensed for consideration that is remotely accessed over the internet, over private or public networks, or through wireless media, is not considered an electronic transfer of computer software and is not considered a retail transaction. In other words, after June 30, 2018, transactions for prewritten computer software remotely accessed from a hosted computer or server or through a pool of shared resources from multiple computers and servers, without having to download the software to the user's computer, are not considered retail transactions, and therefore the purchase, rental, lease, or license of that software is not subject to Indiana sales or use tax.

"Telecommunication services" is defined in IC 6-2.5-1-27.5(a) to mean an "electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points." However, "telecommunication services" does not include the following:

> Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information.

IC 6-2.5-1-27.5(c)(1). The online database is clearly not a telecommunication service, but if there were any question as to whether it were, the online database would not be considered a "telecommunication service" because it meets the exception of providing information services.

Additionally, it has been a longstanding policy of the Department that access to an online database service on its own is not subject to sales tax. Similar to the product at issue, the Department concluded in a prior Revenue Ruling (Revenue Ruling 2011-05ST, (December 9, 2011) 20111130 Ind. Reg. 045110713NRA) that a taxpayer's charges for online access to an information database were not taxable, but charges for the use of certain add-on remotely hosted software applications were taxable under the assumption that the customer obtained a possessory interest in the applications. With regard to the access to the database, the Ruling held that "Taxpayer's sales of access to its online database and its upgraded data packages via the Internet are not subject to Indiana sales and use tax." Regarding the workflow add-ons, however, the Ruling held that "customers are purchasing access to prewritten computer software for which they, the customers, have a possessory interest," and that "Taxpayer's sales of access to its workflow add-ons to end-user customers via the Internet are subject to Indiana sales and use tax when provided to customers located in Indiana." While the "tools" Company provides with the subscription may be like the workflow add-ons, they would not make the service taxable because this prior Ruling was issued before the passage of IC 6-2.5-4-16.7 and the tools are still an aspect of remotely accessed software.

Additionally, the provision of textbooks through the database would not be taxable. IC 6-2.5-4-16.4(b) provides that that *[sic]* a digital book or other specified digital product is taxable when the retailer electronically transfers the specified digital product to an end user and grants to the end user the right of permanent use of the specified digital product that is not conditioned upon continued payment by the purchaser. Because the customers do not have permanent use of the textbooks and other resources that might qualify as specified digital products, it would not be considered a taxable transaction under IC 6-2.5-4-16.4(b).

Finally, a total combined charge for the provision of services, remotely accessed software, and specified digital products that are not for permanent use would not be considered a unitary transaction, nor a "bundled transaction" under IC 6-2.5-1-11.5, because all individual components are either exempt or otherwise not subject to sales tax after July 1, 2018.

RULING

Based on the information provided, Company's online information database is not subject to Indiana sales or use tax, as it is the provision of services, remotely accessed software, and specified digital products that are not for

permanent use.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that subsequent to the publication of this ruling a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection.

Indiana Department of State Revenue

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